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**IN THE  
Supreme Court of the United States**

**OCTOBER TERM, 1979**

No. **79-194**

**REVEREND LOUIS R. GIGANTE,**

*Petitioner,*

**v.**

**RODERICK C. LANKLER, DEPUTY ATTORNEY GEN-  
ERAL OF THE STATE OF NEW YORK, SPECIAL STATE  
PROSECUTOR,**

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE STATE OF NEW YORK**

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SUPREME COURT OF THE UNITED STATES  
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\_\_\_\_\_  
No. \_\_\_\_\_

REVEREND LOUIS R. GIGANTE,  
*Petitioner,*

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,  
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner Reverend Louis R. Gigante respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in this proceeding on May 8, 1979.

OPINION BELOW

The opinion of the Court of Appeals, is reported at 47 N.Y.2d 160, 417 N.Y.S.2d 226 (1979) and appears in the Appendix hereto. The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, is reported at 65 A.D.2d 585, 407 NYS 2d 163 (First Dept., 1978),

and appears in the Appendix as well. There was no opinion, per se, rendered by the Supreme Court of the State of New York, Extraordinary, Special and Trial Term, held in and for the County of New York. The Mandate of Commitment of the court adjudging the petitioner in criminal contempt may be found at page 13a of the Appendix.

### JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 8, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

### QUESTIONS PRESENTED

1. Whether a duly ordained clergyman is free from unnecessary questioning by a state grand jury revolving about the practice of his ministry under the Free Exercise Clause of the First Amendment to the Constitution of the United States.

2. Whether the Court's ruling in *Branzburg v. Hayes*, 408 U.S. 665 (1972) was intended to afford state grand juries the power to compel a clergyman to testify needlessly regarding protected areas of communication and activity.

3. Whether it was the intention of the Court in *Branzburg v. Hayes, supra*, to extend that opinion to the portion of the First Amendment protecting Freedom of Religion.

4. Whether, the grand jury's investigative power, on its face alone, outweighs an individual's right to practice his religion freely.

### STATUTORY PROVISIONS INVOLVED

*United States Constitution, Amendment I:*

*Religious and political freedom.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Civil Practice Law and Rules of the State of New York, Section 4505:*

*Confidential communication to clergy privileged.*

Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor.

### STATEMENT OF THE CASE

Petitioner, a duly ordained Roman Catholic priest since 1959, was subpoenaed on July 20, 1977, by respondent, to appear before an Extraordinary, Special and Trial Term grand jury held in and for the County of New York. As part of his ministry he had undertaken to visit prisons, minister to prisoners, visit their families and talk to prison officials continuously thereafter. R774, 786.\* Respondent stated the purpose of the grand jury's investigation was to inquire of

\*Page references preceded by the letter "R" refer to the Record on Appeal to the Court of Appeals.

"whether or not the crimes of bribery, bribe receiving, receiving reward for official misconduct, official misconduct, escape, coercion, conspiracy, and other related crimes have been committed by any officials or people in the (New York City) Department of Correction, either past or present employees, and also whether any of those crimes have been or are being committed by private citizens." (Minutes of the Extraordinary, Special and Trial Term Grand Jury, August 29, 1977). R. 626.

Petitioner appeared before the grand jury a total of five times in 1977, *i.e.*, August 29, September 7, September 9, November 2 and November 16, and gave testimony before it.

On August 30, 1977, following Petitioner's initial grand jury appearance, the trial court ruled that conversations had directly with a prisoner, James Napoli, had been entered into in a priest-communicant relationship and were protected, as confidential, by state statute, to wit, New York Civil Practice Law and Rules Sec. 4505, *supra*, at 3. R. 377. The trial court held that "a general discussion of the (prison) conditions, if there was such a discussion followed by the understanding of the Father (that he) will do something about it, I think is appropriately within the (statutory) privilege." R. 377-378. As to material not covered by the statutory privilege, Petitioner was directed to respond. R. 390.

At his second and third appearances before the grand jury (September 7 and September 9, 1977), Petitioner did respond to some questions, but declined to respond to others. As to these latter questions, concerning his activities as a priest in Mr. Napoli's behalf, he stated to the grand jury his firm belief that they infringed upon his right to practice his ministry as protected by the First Amendment. R. 728-729; 738-739; 749-751; 774; 776; 779; 782; Appendix at 2a, 4a. Unlike the statutory priest-communicant privilege enunciated in CPLR Sec. 4505, Petitioner made it clear that the right to freely practice one's ministry was personal to the clergyman making the claim, *e.g.*, R. 749-751; 768 (it is from these questions that the eventual adjudgment of contempt stems).

The trial court was to rule twice on the questions propounded at the September, and later November, sessions of the grand jury, specifically, September 29, 1977 and December 21, 1977.<sup>2</sup>

In sum, Petitioner had answered a number of questions before the grand jury which were unaffected by his First Amendment claims. He states, for example, that he knew of no violations of law by public officials or of any illegal actions designed to assist Mr. Napoli. R. 881; 900-901. Yet when asked the questions contained in the Mandate of Commitment (R. 4-5), Appendix at 13a-15a, Petitioner clearly stated that those questions, involving his priestly efforts on behalf of Mr. Napoli, were protected. R. 176, 203, 354-355, 740, 760-761, 888.

The trial court made several trenchant observations, both as to the law and the facts, surrounding Petitioner's predicament. It noted that Petitioner's good faith was beyond reproach. R. 70, 71, 189, 145, 232, 237. The court did not doubt that the issue raised was "a legitimate and significant one" shared, in good faith, by Petitioner's "colleagues and confreres" in the clergy. R. 189.

The court recognized that Petitioner had not made a flat refusal to answer (R. 75) and that whatever activities Petitioner had undertaken on behalf of Mr. Napoli were unquestionably lawful. R. 74; 196. The activities undertaken by Petitioner were of the type that priests normally do and Petitioner was, clearly, acting in a priestly capacity. R. 573; R. 191.

A review of the grand jury proceedings had shown the trial court that Petitioner had no knowledge of improper activities, nor had he done, or become aware of, anything criminal. R. 471-473; 503-504.

In assessing Petitioner's role in the grand jury's investigation, the trial court noted that Petitioner was not a target, nor

2. This latter court action actually began on December 16, 1977 and was adjourned to see whether Petitioner would have a change of heart as to his First Amendment position. R. 198; 228-229.

was the investigation directed at him. R. 146, 148. Petitioner's role was described as "small" and something other than "earth-shaking." R. 109, 437-438. Determining that there were alternative sources of information, the court stated that it "would find it difficult to conclude that (a) compelling showing has been made that (petitioner) has significant evidence of criminal activities which is important for the grand jury to have." R. 572, *accord.*, R. 513, 519.

On December 21, 1977, the trial court adjudged Petitioner in contempt for failing to respond to certain questions propounded before the grand jury. R. 233. As the court had previously stated its reasoning:

"The issue presented is whether or not the activities in which Father Gigante engaged represent an exercise of his religious ministry and has at least a qualified First Amendment protection, at least to such an extent that there will be required a showing that he has clear information of important matters which the Grand Jury is entitled to know.

The status of this principle is by no means clear."

R. 570. Troubled, the court went on to speak of *Branzburg v. Hayes*, 408 U.S. 665 (1972) as failing to recognize such a privilege, but noting that in the critical concurrence of Mr. Justice Powell, "there might be circumstances under which the claim might be sustained." *Id.* All the more troubling was the non-essential nature of the Petitioner's testimony. Some of the questions in the Mandate asked the witness to recall conversations had with prison and correction officials on behalf of Mr. Napoli. Petitioner refused to answer, pointing out that the grand jury had full tape recordings and transcripts of those conversations (made with the consent of the other party) already before the grand jury. Petitioner's recollection as to whether these conversations occurred or what was said was therefore immaterial. Other questions had been substantially answered previously. Relying on *Branzburg v. Hayes, supra*, the court felt constrained to deny the First Amendment claim and adjudge

Petitioner in contempt.

The Supreme Court of the State of New York, Appellate Division, First Judicial Department, affirmed, holding that *Branzburg v. Hayes, supra*, was dispositive.

"[T]he Court in *Branzburg* explicitly held that the only constitutionally protected testimonial privilege for unofficial witnesses is the Fifth Amendment right against compulsory self-incrimination."

R. 960. The Presiding Justice, however, dissented, stating *Branzburg* to be inapplicable to matters such as these:

"*Branzburg* dealt with a newspaper reporter's claim of First Amendment protection; not with the historical and more universally recognized clergy-communicant privilege."

R. 961.

The Court of Appeals of the State of New York similarly affirmed, relying on *Branzburg*, and holding in substance that the grand jury's investigative power was, by itself, superior to Father Gigante's right to freely practice his ministry. Appendix at 1a.

By order of the trial court justice, the Petitioner's sentence of 10 days imprisonment has been stayed pending the Court's action on his petition.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW NEEDLESSLY AND IMPROPERLY ABRIDGES APPELLANT'S FREEDOM OF RELIGION.

The area of governmental intervention and religious independence has been described as "highly sensitive" and one where only the most paramount governmental needs and interests will be permitted to limit, in any respect, religious freedoms. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Even showing of a compelling or paramount state interest does not warrant an infringement of an individual's freedom of religion unless the state's interests are "not otherwise served" [*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)] and there are "no alternative forms of regulation" [*Sherbert v. Verner*, *supra* at 407].

While the free exercise of one's religion is not absolute [*Braunfield v. Brown*, 366 U.S. 599 (1961)], it should only be regulated when it poses "some substantial threat to public safety, peace or order." *Sherbert v. Verner*, *supra* at 402-403 (emphasis supplied). Although "religiously grounded conduct must often be subject to the broad police powers of the State, . . . there are areas protected by the Free Exercise Clause of the First Amendment and thus beyond the powers of the State to control." *Wisconsin v. Yoder*, *supra* at 220. Thus, "only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion." *Id.* at 215 (emphasis supplied).

In the case at bar, the evidence sought to be obtained by the grand jury from Petitioner was already possessed by the grand jury; in large part, in far superior and more accurate form than Petitioner's mere recollection. Consequently, requiring Petitioner to repeat, by his testimony, this material, arguably served no legitimate purpose at all, let alone any paramount state interest. Thus, in the absence of such a finding and given the inconsequential nature of the evidence Petitioner could impart to

the grand jury, the court below was constitutionally required to respect and protect Petitioner's overriding religious interests.

That this protection should extend under these circumstances regardless of the extent of impact on Petitioner's right is manifest. Though in the case at bar the impact is great,<sup>3</sup> so long as there is indeed an impact, the First Amendment must be served. *Cf. McDaniel v. Paty*, 435 U.S. 618 (1978).

Furthermore, in any judicial examination of governmental restraints on First Amendment rights not only should the specific factual context examined but the resultant effect on religious freedom as a whole—the so-called "chilling effect"—must be considered. *Weiman v. Updegraff*, 344 U.S. 183 (1952). Should Petitioner's conviction be affirmed, there will be a significant chilling effect on both the activities of clergy in the course of their ministry and in the candor with which prisoners and other communicants confide in their clergyman.

The New York Court of Appeals ruled,

"Appellant's broader contention that he would not respond to the questions posed by the Grand Jury because disclosure would unduly impinge upon the right to practice his ministry as guaranteed by both the State and Federal Constitutions is equally without merit. In our view, the Constitutional rights claimed by appellant cannot serve to justify his refusal to answer."

Appendix at 6a.

In so holding the court wrongly interpreted *Branzburg* and lower court cases<sup>4</sup> to mean that the grand jury's investiga-

3. Petitioner's ministry was uniquely addressed to prisoners. R. 227, 175, 176.

4. For example, the Court found authority in *People v. Woodruff*, 26 A.D.2d 236, 239, *affd.* 21 N.Y.2d 248 (1968), which held, "The State's interest in enforcing the power of the grand jury to inquire into the commission of crime is paramount to the contemnor's religious right in the context of this case . . . Her religious scruples must give way to the dominant right of the State to maintain peace and order."

tive role was omnipotent, even to the extent of seriously and unnecessarily abridging the right to free exercise of one's religion. This certainly cannot be the intent of the Bill of Rights.

It is beyond peradventure that the First Amendment holds a preferred position among the other constitutionally protected areas, e.g., *NAACP v. Button*, 371 U.S. 415, 433 (1963). Central to that amendment are those values underlying its Freedom of Religion provisions. *Wisconsin v. Yoder*, *supra* at 234. Unlike the right to free exercise of religion, which has clearly been incorporated to the States as a limitation on state government, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the right to indictment by grand jury is not even required in many states and an attempt to constitutionally require that right in state proceedings has long been rejected. *Hurtado v. California*, 110 U.S. 516 (1884).

It is clear that a "grand jury subpoena is (not) some talisman that dissolves all constitutional protection." *United States v. Dionisio*, 410 U.S. 1, 11 (1973). The court below merely paid lip service to balancing the competing interests of the state and the individual, and simply reiterated that the grand jury, on its face, serves a compelling purpose. While Petitioner agrees that the grand jury serves an important function in our society, it must not take absolute precedence over the cherished freedom of religion afforded by the First Amendment. Decisions enunciated by the Court give support to Petitioner's contention that, in the light of his inability to impart meaningful and significant new evidence to the grand jury, his freedom to practice his ministry should have taken precedence. *NAACP v. Button*, *supra*; *Sherbert v. Verner*, *supra*; *Wisconsin v. Yoder*, *supra*; *Thomas v. Collins*, 323 U.S. 516 (1945).

Petitioner would submit that, in the light of the foregoing discussion, to ask a witness to recollect conversations, which both the witness and the grand jurors know have been recorded and transcribed (and are placed before all of them as the questions are asked), in the face of the witness' avowed sensitivity to the effect upon his ability to freely exercise his religion, is im-

proper under the First Amendment. In such a case the interest of the grand jury is certainly something short of compelling while the interest of the witness is basic and primary.

## II.

### THE COURT BELOW ERRED IN EXTENDING *BRANZBURG v. HAYES, SUPRA*, TO FREEDOM OF RELIGION CASES.

This Court held in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that, in the factual settings presented by the three appeals considered, reporters had no testimonial privileges in the face of grand jury questioning. However, the Court specifically narrowed its holding by stating, "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." *Branzburg*, *supra* at 682. Thus, by this Court's own limitation, *Branzburg* was not to be applied expansively.

Moreover, the facts of *Branzburg* differ radically from those of the instant case, thereby making *Branzburg* even less applicable. First of all, there were no readily available alternative means for the grand jury to obtain the information it sought in *Branzburg* other than by questioning the reporters. The grand jury, thus, likely had a compelling reason for calling them. "The grand jury called these reporters as they would others—because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred. . . ." *Branzburg*, *supra*, at 701. As already shown, the grand jury had no need to call Petitioner. In the words of *Branzburg*, he was not needed to "supply information to help the Government," since the grand jury already had the information it sought. Secondly, the interests to be served by protecting reporters' right to report are not as strong as those to be served by protecting the free exercise of religion by clergy and

citizens everywhere. The purpose behind protecting a reporter's information gathering ability indirectly affects the public's right to know, which, although important, is not as central to our society as the primary and basic right to practice one's religion freely. Finally, *Branzburg* found that forcing disclosures upon reporters would only indirectly affect their ability to gather information and would thus only affect remotely, if at all, the public's right to know.<sup>5</sup> This must be contrasted with the immediate effect on clergy and public alike should Petitioner's conviction be upheld. Priestly missions are an integral part of the practice of religion. Clergy must be afforded constitutional protection in effectuating their missions, for without it, there can be no missions at all. Unlike the reporters in *Branzburg*, who probably would have obtained their news without special protection from grand jury questioning, Petitioner, and other socially active and committed clergymen, clearly rely on the First Amendment to protect their priestly activities among those to whom their missions are directed.

The import, and the resultant impact, of *Branzburg*, Petitioner would contend, is limited by the facts of the case and the position of the parties before the Court.

Unlike the situation in the case at bar, the reporters in *Branzburg* argued that it was incumbent on the grand jury seeking their testimony to first exhaust any available alternative means available to garner similar information. The burden, the reporters argued, would be on the grand jury to show that the reporters' testimony was essential. Compare, therefore, the matter currently before the Court. Here, the information sought from the witness expressing a First Amendment claim

5. The *Branzburg* Court noted, "Nothing before us indicates that a large number or percentage of all confidential news sources fall into either category and would in any way be deterred by our holding that the Constitution does not as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task." 408 U.S. at 691.

has already been before the grand jury (and in a far more accurate, dispassionate and reliable form). "Alternative means," therefore, is not truly at issue, for that term directs itself at further and additional action by the grand jury.

Yet even more important is Mr. Justice Powell's short but cautionary concurrence, which supplied the fifth vote needed for majority. Mr. Justice Powell reminded that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." 408 U.S. at 710

It is doubtful that the Court could have foreseen that so many others would misread the *Branzburg* opinion. In the case at bar, it is extended to the Freedom of Religion clause, even though the Court's holding was specifically limited to Freedom of Press and Speech. 403 U.S. at 667. The Court below held that *Branzburg* was controlling of Petitioner's claims. Appendix at 6a, 3a. (It was only the Presiding Justice of the intermediate appellate tribunal who, stating it simply, found *Branzburg* inapplicable. (407 NYS 2d at 164).

The Court has never viewed the powers of the grand jury as absolute. Those powers are to be tempered with reasonableness, fairness and necessity. At times, and in certain situations, there are interests which overbalance the grand jury's right to everyman's evidence, most notably in situations involving the Fifth and Fourth Amendments. *Branzburg v. Hayes, supra* at 737 (Stewart, J., dissenting). To permit, without additional guidance, the extension and application of the Court's opinion in *Branzburg* into the most traditional and jealously guarded area of personal religious freedom would be unfortunate. To needlessly require Petitioner to choose between his God and his freedom is a choice so repugnant to the American experience that it is deserving of comment, analysis and review.

**CONCLUSION**

THE PETITION SHOULD BE GRANTED BY THIS  
COURT.

Respectfully submitted,

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**APPENDIX "A"**  
**OPINION OF THE COURT OF APPEALS**

**STATE OF NEW YORK**  
**COURT OF APPEALS**

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In the Matter of  
Deputy Attorney General, John F. Keenan,  
Special State Prosecutor,

Respondent,

vs.

Reverend Louis R. Gigante,

Appellant.

---

(143) Barry Ivan Slotnick & Jay L.T. Breakstone, NYC for  
appellant.

John F. Keenan, Deputy Attorney General, Special State  
Prosecutor (Thomas A. Duffy, Jr., Mark M. Baker &  
Michael Shapiro of counsel) respondent pro se.

JASEN, J.:

We are called upon in this case to balance the weighty considerations of society's right to expose criminal improprieties within the New York City Department of Correction and a priest's solemn obligation to assist those who beckon for his guidance and help in the utmost confidence.

These are the pertinent facts. At the direction of the Extraordinary Special and Trial Term Grand Jury of New York County, appellant Reverend Louis Gigante, an ordained priest of the Roman Catholic faith and, at the time, a New York City Councilman, was subpoenaed to appear and testify before the Grand Jury, impaneled to investigate abuses and improprieties within the New York City Department of Correction, with respect to preferential treatment accorded certain members of organized crime incarcerated in New York City correctional facilities. On August 29, 1977, appellant, after receiving immunity (CPL 190.40), was questioned concerning both his relationship with various employees of the Department of Correction and his efforts to secure for one James Napoli, a prisoner incarcerated from October 1974 to March 1975 in institutions under the jurisdiction of the New York City Department of Correction, a Christmas furlough and entrance into a work-release program. Although appellant responded to these questions, when asked if he had any conversations with Napoli concerning the conditions of Napoli's incarceration, appellant refused to answer asserting the priest-penitent privilege. On August 30, 1977, the presiding Justice ruled that "the privilege was appropriately invoked" with respect to these conversations.

On September 7th, appellant reappeared before the Grand Jury and was asked about a conversation he had with an officer of the New York City Department of Correction which was allegedly prompted by an earlier discussion with Napoli. Appellant did not respond, stating: "I really refuse to answer basically, not only as a priest, but that the questions attempt to infringe upon my practicing my ministry, which is protected by the First Amendment of the Constitution."

Again, on September 9th, appellant refused to answer several inquiries upon the ground that the priest-penitent privilege and his First Amendment right to practice his ministry precluded him from replying. A sampling of the questions are as follows:

"Q. Do you recall speaking to Mr. Ford [a Correction Department official] about James Napoli, Sr. and concerning the possibility of Mr. Napoli being put in a work-release program?

\* \* \*

Q. Do you recall saying in substance to Mr. Ford, 'And if I prove that people have gotten out who are heavy gamblers, who are organized crime what happens then, make a big stink about it? I know a lot of things that have happened that I will not divulge at this time, a lot of things that is bad for the Correction Department. I don't want to hurt you. I would only use that as a means of helping James Napoli.'

Do you recall telling that to Mr. Ford?

\* \* \*

q. During the period of time from October 30, 1974 to March 27, 1975, did you talk to Jesse Harris [a Correction Department official] concerning getting Mr. Napoli in a work-release program?

\* \* \*

Q. During the period of October 30, 1974 to March 27, 1975, did Jesse Harris refer you to Deputy Commissioner Birnbaum concerning the possibility of getting James Napoli into a work-release program?

\* \* \*

Q. Father, did you on behalf of your brother, Ralph Gigante, contact Jesse Harris in an effort to get your brother transferred from Rikers Island to a less strict institution in the Department of Correction?"

The parties sought the assistance of the court to determine whether appellant was justified in refusing to answer. On September 29th, the Judge, although observing that nothing in the minutes before the Grand Jury intimated that appellant engaged in any criminal activity, found that the "Grand Jury might reasonabl[y] wish to inquire into the apparent use in part of [appellant's] position as a public official on behalf of a prisoner \* \* \*, and there is at least a possibility in the absence of any answers from the Father that he might have information of some criminality attending Napoli's treatment." The court denied appellant's claim of a First Amendment privilege "ex-

cept as to his conversations with Mr. Napoli," and directed appellant to answer questions "relating to either his efforts to secure a furlough or work-release program for Mr. Napoli or as to any knowledge that he may have of preferential treatment that Mr. Napoli received in terms of visitors, food, assignments, [and] work assignments."

Thereafter, on both November 2 and 16, 1977, appellant again testified before the Grand Jury. On November 16th, appellant refused to reply to many of the inquiries which the court had previously determined to be proper. Appellant reiterated his position that he would not respond because to do so would jeopardize the free exercise of his ministry. Further, appellant asserted that the prosecutor had already obtained the requested responses insofar as appellant had fully answered such inquiries at prior proceedings and the prosecutor had in his possession a transcript of the conversations between appellant and Mr. Ford, a Correction Department official, which had been recorded by the latter.

On December 16 and 21, 1977, appellant, pursuant to an order to show cause, appeared before the court to explain why he should not be adjudged in criminal contempt (Judicial Law, §750) for his refusal to respond to those questions which the court had directed him to answer. Appellant, remaining steadfast in his prior position that he would not respond, was held in contempt and committed to prison for ten days. On appeal, the Appellate Division affirmed the judgment of contempt.<sup>1</sup> There should be an affirmance.

On this appeal, appellant justifies his recalcitrance before the Grand Jury on two grounds: First, the existence of a priest-penitent privilege which forbids disclosure of the requested information; and, second, the right to practice his ministry

1. By order dated September 7, 1978, the Appellate Division stayed the execution and enforcement of the judgment of Supreme Court pending the determination of this appeal.

unhampered by the "chilling effect" which compelled disclosure might breed. We now conclude that neither asserted justification can serve to shield appellant from his obligation to respond to the Grand Jury's inquiries.

It has been recognized, without serious disagreement, that there existed no common law priest-penitent privilege. (See, generally, 8 Wigmore, Evidence [McNaughton rev 1961], §2394; Richardson, Evidence [10th ed], §424). By statute, however, "a confession or confidence made to [a clergyman] in his professional character as spiritual advisor" shall not be disclosed "[u]nless the person confessing or confiding waives the privilege." (CPLR 4505). It is clear that the Legislature by enacting CPLR 4505 and its predecessors responded to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized.

The priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed. There must be "reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential" for it is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect. (*Matter of Puglisi v. Pignato*, 26 AD 2d 817; CPLR 4505; see *People v. Gates*, 13 Wend. 311, 323-324; *Kruglikov v. Kruglikov*, 29 Misc 2d 17, app dsmd 16 AD2d 735; *United States v. Wells*, 446 F2d 2, 4; see, generally, Ann., Matters to Which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends, 71 ALR3d 794, 808809).

Although we recognize that statutes bestowing an evidentiary privilege should be construed in furtherance of their "policy to encourage uninhibited communication between persons standing in a relation of confidence and trust" (*People v. Shapiro*, 308 NY 453, 458-459), it is all too apparent here that the questions which appellant was directed to answer did not jeopardize the atmosphere of confidence and trust which

allegedly enveloped the relationship between appellant and Napoli. Rather, the inquiries were directed to elicit from appellant efforts taken by him, independent of any communications between appellant and Napoli, to secure for the latter entrance into a work-release program. Compelling disclosure as to these matters would not do violence to the social policies underlying the priest-penitent privilege insofar as appellant contacted officials of the Department of Correction, strangers to the confidential relationship, in his attempt to assist Napoli. It is only these contacts with the Department of Correction officials that the court ordered disclosed, and the revelation of such conversations, spoken outside the sphere of confidentiality, cannot be said to fall within the sanctuary of the priest-penitent privilege.

Appellant's broader contention that he would not respond to the questions posed by the Grand Jury because disclosure would unduly impinge upon the right to practice his ministry as guaranteed by both the State and Federal Constitutions is equally without merit. In our view, the constitutional rights claimed by appellant cannot serve to justify his refusal to answer.

There can be little doubt that the Grand Jury serves a compelling State interest to ensure that peace and order is maintained in our society.<sup>2</sup> It functions to protect the community from disruption by those who elevate and obtain their purely personal desires in ways not sanctioned by society-at-large, while, at the same time, protecting persons from unfounded accusations. (See *People v. Woodruff*, 26 AD2d 236, 238-239, affd 21 NY2d 848; *Branzburg v. Hayes*, 408 US 665, 686-688; *Smilow v. United States*, 465 F2d 802, 804-805, vacated on other grounds 409 US 944).

In furtherance of its essential function, the Grand Jury, as

2. As our State Constitution commands: "The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law." (N Y Const, art I, §6.)

an arm of society, is entitled to the assistance of all members of the community in uncovering criminal acts. The enduring command that "[e]very man owes a duty to society to give evidence when called upon to do so" must be honored if the fundamental task of the Grand Jury is to be realized. (*People v. Woodruff*, 26 AD2d 236, 238-239, *supra*, citing *Matter of Manning v. Valente*, 272 App Div 358, 364, affd 297 NY 681; see *Branzburg v. Hayes*, 408 US 665, 688, *supra*; cf. *Matter of Jacqueline F.*, \_\_\_NY2d\_\_\_ [decided herewith].)

On the record before us, appellant raises no colorable First Amendment right. His right to practice his ministry cannot serve to shield him from shedding light upon whether or not any unlawful efforts were undertaken to assist those confined in New York City penal institutions to obtain special privileges and entrance into work release programs or to obtain a transfer to less secure institutions. In so holding, we observe that the statutory privilege (CPLR 4505) affords appellant any necessary protection against infringement of freedom of religion by Grand Jury investigations, and we reject his contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute. (Cf. *Branzburg v. Hayes*, 408 US 665, *supra*.) Absent a showing that the conversations sought to be disclosed are embraced by the priest-penitent privilege, appellant, even though a clergyman, is, like all citizens, obligated to respond to those questions relevant to the Grand Jury's investigation.

Nor do we accept appellant's contention that insofar as the Special Prosecutor already received the necessary responses to his questions or possessed an alternate source from which they could be obtained, further compelled answers would serve only to infringe upon, without reason or justification, appellant's asserted constitutional rights. Faced with a similar challenge involving a claim by reporters that the State must first demonstrate "that a crime has been committed and that [the reporters] possess relevant information not available from other sources" before they can be required to testify before the Grand

Jury, the Supreme Court in *Branzburg v. Hayes* (408 US 665, *supra*) observed:

"The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. 'When the grand jury is performing its investigatory function into a general problem area \*\*\* society's interest is best served by a thorough and extensive investigation.' *Wood v. Georgia*, 370 U.S. 375, 392 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' *United States v. Stone*, 429 F.2d 138, 140 (CA2 1970)." (*Id.* at p. 701.)

Simply stated, it is for the Grand Jury to determine the most efficacious procedure to carry out its investigation, and even assuming the Grand Jury could have obtained the answers to its stated questions from an alternate source, it was entitled to hear such answers from appellant and probe further into the facts so revealed if it deemed more extensive inquiry necessary to carry out its function.

In sum, we now hold that in the context of this case appellant was not justified, either by virtue of the claimed priest-penitent privilege or by reason of his claimed right to practice freely his ministry, in refusing to respond to the questions which the court directed him to answer. As to appellant's remaining contentions, we find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

\* \* \* \* \*

Order affirmed, without costs. Opinion by Jasen, J. Concur: Cooke, Ch. J., Jones, Wachtler and Fuchsberg, JJ. Gabrielli, J., taking no part.

Decided May 8, 1979

## APPENDIX "B" OPINION OF APPELLATE DIVISION

Application of Deputy Attorney General,  
John F. KEENAN, Special State Prosecutor,

Petitioner-Respondent,

v.

Reverend Louis R. GIGANTE,

Respondent-Appellant,

Roman Catholic Archdiocese of New York,  
Amicus Curiae.

Supreme Court, Appellate Division,  
First Department

July 20, 1978

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Appeal was taken from a judgment of the Supreme Court, New York County, Leonard H. Sandler, J., committing witness to prison for ten days for criminal contempt in refusing a direction to answer questions before the grand jury. The Supreme Court, Appellate Division, held that clergyman had no privilege not to answer questions before grand jury where inquiries did not concern confidential communications or confessions made by penitent to clergyman.

Affirmed.

Murphy, P.J., dissented in a memorandum.

Kupferman, J., filed a memorandum concurring in part and disssenting in part.

## 1. Grand Jury 36

Clergyman had no privilege not to answer questions before grand jury where inquiries did not seek disclosure of confidential communications or confessions made by penitent to clergyman. CPLR 4505.

## 2. Witnesses 215

There is no privilege, common law or statutory, which invests a clergyman's ministry with immunity against disclosure; statutory privilege protects only confidential communication or confession made by penitent to clergyman or spiritual advisor. CPLR 4505.

T.A. Duffy, Jr., Great Neck, for petitioner-respondent.

B. I. Slotnick, New York City, for respondent-appellant.

L. X. Cusack, New York City, for amicus curiae.

Before MURPHY, P. J., and KUPFERMAN, BIRNS, EVANS and SULLIVAN, JJ.

## MEMORANDUM DECISION

Judgment, Supreme Court, New York County, entered December 29, 1977, committing appellant to prison for 10 days for criminal contempt in refusing a direction to answer questions before the grand jury, affirmed, without costs or disbursements.

[1] *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 is dispositive of appellant's claim of privilege. Although confronted with a freedom of the press issue, the Court in *Branzburg* explicitly held that the only constitutionally protected testimonial privilege for unofficial witnesses is the Fifth Amendment right against compulsory self-incrimination. (*Id.* at pp. 689-690, 92 S.Ct. 2646).

[2] There is no privilege, common law or statutory, which invests a clergyman's ministry with an immunity against disclosure. The statutory privilege, which was unknown at com-

mon law (see Richardson, Evidence, §424 [10th ed., Prince 1973]), protects only the confidential communication or confession made by the penitent to the clergyman or spiritual advisor (CPLR 4505). The inquiries here in no way sought to invade that sanctuary.

All concur except MURPHY, P.J., who dissents in a memorandum and KUPFERMAN, J., who concurs in part and dissents in part in a memorandum as follows:

MURPHY, Presiding Justice (dissenting).

I find neither an abandonment by appellant of his claim of privilege nor the holding in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed. 2d 626, applicable to this case.

*Branzburg* dealt with a newspaper reporter's claim of First Amendment protection; not with the historical and more universally recognized clergy-communicant privilege.

Appellant was ordained a priest of the Roman Catholic faith in 1959 and for some 18 years thereafter (including the 4 year period during which he was an elected member of the City Council) he visited prisons and ministered to prisoners as part of his priestly ministry.

Although the Justice presiding at the Extraordinary Special and Trial Term sustained appellant's invocation of the priest-penitent privilege, he improperly limited it solely to conversations between appellant and the prisoner Napoli; and denied it with respect to appellant's activities in Napoli's behalf as a result of such conversations.

In my view, the asserted actions taken by appellant were also in exercise of his ministry as a priest of the Roman Catholic Church and were, in the circumstances here presented, equally protected.

Accordingly, I would reverse the order appealed from and vacate the commitment mandated thereby.

KUPFERMAN, Justice (concurring in part and dissenting in part).

The Court of Appeals in a case involving the question of whether a clergyman, who was also a lawyer, could wear his clerical garb while on trial, *La Rocca v. Lane*, 37 N.Y.2d 575, 376 N.Y.S.2d 93, 338 N.E.2d 606, while recognizing the "right to free exercise of religion, certainly a preferred right included among the great human rights in a free and open society" (p. 581, 376 N.Y.S.2d p. 99, 338 N.E.2d p. 611), still determined that there was a proper line of demarcation between the lay and the ministerial function. Of course, this was long ago recognized at the source. "Render therefore unto Caesar the things which are Caesar's." Matthew 23:21. See also Mark 12:17; Luke 20:25. Nonetheless, I would reduce the commitment, as a matter of discretion, to one day. The principle having been established, no purpose would be served by a longer period of incarceration.

**APPENDIX "C"**  
**MANDATE OF COMMITMENT**  
**FOR CRIMINAL CONTEMPT**

At an Extraordinary Special and Trial Term of the Supreme Court of the State of New York, County of New York, at the Criminal Court Building, 100 Centre Street, New York, New York, on the 27th day of December, 1977.

PRESENT:

HON. LEONARD H. SANDLER

Justice of the Supreme Court

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In the Matter of  
The Application of Deputy Attorney General  
JOHN F. KEENAN, Special State Prosecutor,

Petitioner,

-against-

REV. LOUIS R. GIGANTE,

Respondent.

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Petitioner, John F. Keenan, Special State Prosecutor, having moved by order to show cause, dated December 13, 1977, for an order, pursuant to section 750 and 751 of the Judiciary Law, adjudging the respondent, Rev. Louis R. Gigante, guilty of criminal contempt for his willful, contumacious and unlawful refusal to answer legal and proper interrogatories asked of him while he was a witness before the Extraordinary Special and Trial Term Grand Jury of New York County;

NOW, upon reading and filing the order to show cause dated December 13, 1977, with proof of due and timely service thereof, the affidavit of Thomas A. Duffy, Jr., duly sworn to December 13, 1977, in support of petitioner's application, and the affirmation of Barry Ivan Slotnick, dated December 15, 1977, together with the exhibits annexed thereto, in opposition to petitioner's application and after a hearing on the application conducted on December 16 and 21, 1977, and upon reading and considering all of the exhibits submitted in support of and in opposition to the application, it is

ORDERED AND ADJUDGED, that the said witness respondent, Rev. Louis R. Gigante, be and is hereby found guilty of Criminal Contempt of this Court as a result of his willful, contumacious and unlawful refusal to answer, on November 16, 1977, while a witness before the Extraordinary Special and Trial Term Grand Jury of New York County, legal and proper interrogatories which this Court, on September 29, 1977 directed him to answer, to wit:

"Do you recall speaking to Mr. Ford about James Napoli, Sr., and concerning the possibility of Mr. Napoli being put in a work release program?"

"Do you recall saying in substance to Mr. Ford, 'And if I prove that people have gotten out who are heavy gamblers, who are organized crime, what happens then? Make a big stink about it? I know a lot of things that have happened which I will not divulge at that time, a lot of things that is bad for the Correction Department. I don't want to hurt you. I would only use that as a means of helping James Napoli.' Do you recall telling that to Mr. Ford?"

"And during the period from October 30, 1974, to March 27, 1975, did you talk to Jesse Harris concerning getting Mr. Napoli in a work release program?"

"During the period of October 30, 1974, to March 27, 1975, did Jesse Harris refer you to Deputy Birnbaum, Deputy Commissioner, concerning the possibility of getting James Napoli into a work release program?"

"Father, did you on behalf of your brother, Ralph Gigante, contact Jesse Harris in an effort to get your

brother transferred from Riker's Island to a less strict institution in the Department of Correction?"

AND IT IS ORDERED AND ADJUDGED, that the said witness respondent, Rev. Louis R. Gigante, for the said Criminal Contempt of the Court, be imprisoned in a New York City Correctional Institution For Men for a period of ten (10) days, the period of imprisonment to be stayed until January 13, 1978, pending an application to the Appellate Division, First Department, for a stay.

ENTER:

s/Leonard H. Sandler

LEONARD H. SANDLER

Justice of the Supreme Court

#### APPENDIX "D" EXCERPTS OF MINUTES

##### Colloquy

THE COURT: I denied the motion, okay.

MR. SLOTNICK: —is well aware in his running commentary of the responses of the leading cases in this area, including Bronston, which although it's a perjury case deals with what is responsive and what is not responsive.

With regard to the responses given by Father Gigante, at this moment in time I would address myself strictly and solely to the papers that the special prosecutor—

THE COURT: I am virtually hoping for a little more.

MR. SLOTNICK: I cannot until such time as I receive my discovery and even at that time I cannot indicate to the Court whether I will be able to come back with a less ambiguous response.

THE COURT: It's not clear to me, Mr. Duffy, whether

each of the recorded conversataions that were the subject of questions to Father Gigante, that he was given transcripts of the recordings in connection with the questions. I know it was done in part, at least part.

MR. DUFFY: He was shown some transcripts, Your Honor.

\* \* \*

when you say that, I think it might lead to inferences which are unfair to your client, although I'm sure you do not intend that.

It would not be fair to suggest that it's been a lengthy investigation into your client. It's been a lengthy investigation into aspects of certain events in the Department of Correction in which your client plays a relatively small role.

MR. SLOTNICK: That's clear, your Honor. I will relate to that in subsequent argument.

I have presented to the Court on a prior occasion certain theories of defense—

THE COURT: I'm trying to confine at the moment to the question of discovery, which I see is preliminary—

MR. SLOTNICK: That's what I'm getting to. It's relevant to the discovery.

One of the theories of defense that we presented to the Court is the fact that there are alternative means within which the Special Prosecutor might receive total and full responses.

The Court, even after reading the Smilow case, which apparently is a pronouncement of the Second Circuit, tended at that time to direct Father Gigante to respond.

We would like to be able to fully prepare and present our defense, to have all of the grand jury minutes. If your Honor does not again allow us the luxury of having the grand jury minutes, then I think I can pretty well show the alternative means and methods by what I've already gotten the fact that the grand jury had that.

THE COURT: I think that having read them myself I am aware of the fact that there are certain areas, alternative sources of information.

The question is whether or not the grand jury is nonetheless entitled to Father Gigante's answers in those areas and related areas. And my conclusion, reached sometime ago, which was the basis of my direction earlier to Father Gigante, was that they were entitled in specific areas to this information.

MR. SLOTNICK: We would indicate, your Honor, at a later date—again, I just don't want

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“Answer: I'm not going to answer until I see the Judge.

“Question: Did you speak to Jesse Harris concerning your brother, Ralph Gigante?

“Answer: Don't you have that answer, Mr. Keenan?

“Question: Did your brother Mario ever tell you that he paid \$50 to a correction officer to do favors on behalf of the prisoner, James Napoli?”

I must say the last question is a different theme and apparently was not the subject of a direction by me to the witness.

Am I correct, Mr. Duffy?

\* \* \*

of an investigation not directed at him, perfectly legitimate, in which it was in fact proper to find out whoever did anything on behalf of prisoners, whether it was he or anyone. That's just a comment which I hope will have some impact.

Mr. Duffy, I think the Grano answers, I must admit, were fairly full. I think you must admit also on the occasion of the first meeting, although there was resistance to an effort to go to the subject matter again.

On the others, the principal defense is that he said with regard to questions based upon taped conversations, you already have that information. Logically, that amounted to an affirmance of the events that occurred, and although clearly not an affirmance which is appropriate in responding to a grand jury as a general principle, the argument I think is that it does not represent a wilful defiance of my direction to answer.

Do you wish to be heard on that?

MR. DUFFY: Your Honor, with respect to the answers, they were not answers to the

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THE COURT: (Continuing) But I think that the areas of questioning that I perceive as being pursued are appropriate for the grand jury.

There is no indication yet of any knowledge on his part of improper activities in connection with Mr. Napoli. There may not be such knowledge. But I think they have a right to find out what, if anything, he knew about it.

Now, I'm not happy, and I've made that clear about the citation of contempt with regard to the particular questions and the particular answers, but I am prepared to make a direction and I would hopefully—and I would hope I could make it fairly quickly and give you and Father Gigante at least over lunch to think about it, and then we might reassemble.

I want Father Gigante to answer specifically the questions with regard to conversation with Ford, Harris, and—the last 5 questions. If the answer, he cannot in good conscience say that which he implied; I would view that as a wilfull refusal and would reluctantly and most unhappily make a finding of contempt which,

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in terms of having been helpful in what would appear and be described as a constructive way in regard to preventing the removal of a senior person for political reasons.

So combined political or communal relations with another person, all that seems to be mixed into the picture. And taken by itself, the problem there is not that anything that was done is something that I would consider improper or that a Grand Jury does consider improper, but whether or not it is an appropriate subject of a Grand Jury inquiry in connection with other evidence in this case as to whether his political influence was being used in part on behalf of a prisoner who was receiving some consideration from other people at the same time.

Side by side with this—I'm not sure "side by side" is correct—but on a parallel to this, there is evidence that Mr. Napoli was receiving what would appear to be preferential treatment.

Members of his family were obviously concerned that he should be comfortable and happy, get assignments appropriate to his age, be secure in terms of other prisoners, be treated as well as possible; and for varying reasons and varying considerations, that there was a response by members of the Department of Correction to those independent efforts.

I see no evidence that Father Gigante was personally at all connected with these independent efforts; nor any direct evidence that he had knowledge of them, although whether or not he did might well be an aspect of the interrogation. And as to whether these other efforts and their responses were criminal, I'm by no means clear. I suspect there's a prima facie case against somebody for giving unlawful gratuities. Somebody from the Prosecutor's Office might think and the Grand Jury may think that would spell out a more serious charge than that, I'm not sure.

\* \* \*

And I don't know that I must tell you, but under the circumstances, I found it very compelling myself that a group concerned with counseling people who had conscientious scruples against participating in the Vietnamese War in a spiritual and advisory way, that an effort was made to invade the records and documents of their activities. And I think that Vorplank does represent, in part, a holding in that area that there must be some showing of justification to overcome this kind of invasion, the kind that was involved there.

You see, the problem—I have a feeling and I've had it for some days that I'm living in a fantasy world in this case, and maybe you are, as well. I'm not saying it is a fantasy, but the situation is a fantasy.

There is no indication that you've done anything, in my opinion, that is criminal or culpable, although certainly in some of your responses people disagree with you in terms of your

evaluation of a particular person. There might be a disagreement as to how realistic that is. That doesn't mean it's culpable.

There is no evidence that you were aware of anything illegal occurring or of favored treatment being given. And yet I would not be unhappy if the Grand Jury said, "Well, why bother with it?" That would strike me as very reasonable.

But if they feel that they want to explore what seems to them to be a test case of an attempt to use a political position to affect the situation of a prisoner when they view as an organized crime figure, I find it hard to see that they don't have the right to get answers to that.

Although, I am appalled at the prospect of a ruling that would result in a refusal, that would result in a contempt, and what have you. I'm appalled by it.

It seems to me to be a fantasy be-

\* \* \*

different.

THE COURT: This is not critical, but it is something else on my mind.—

MR. SLOTNICK: In terms of that so the record is clear, I seriously doubt if I would be entitled to all the Grand Jury minutes. But if I made an issue of alternative means, I think I would be entitled to them.

THE COURT: Let me just express a couple of comploting thoughts, or at least different thoughts.

One is, at the time the notion to quash was filed, I would say frankly I was wholly unaware of the character of the argument that has subsequently developed, which I think is, if not under the circumstance ultimately persuasive to me, it certainly is not frivolous.

MR. BORNSTEIN: By that, you're referring to the arguments that are now in issue, Judge?

THE COURT: Right. I don't consider them frivolous, because in part I think my response really rests upon a factual sense that it's not a pure priest-ministry situation; that if it were, I might be persuaded to apply a balancing test. And in view of

my perhaps incorrect assessment of the evidence, I would conclude that a compelling need had not been shown. Opinions can disagree on that.

Mr. Slotnick, for whatever reasons, was induced to withdraw the motion. But I think that it would not, as I see it, be injurious to permit a procedural situation in which the Appellate Division could have the option, if they wished, of considering that issue.

I'm not convinced that what I'm proposing, in fact, will be taken by them as permitting an appeal, but it's in an effort to create a situation in which they may at least consider whether an appeal is appropriate and whether or not they think the issues merit a stay on argument.

And I'm not persuaded that the investigation will suffer in any significant

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that were presented, but I would find it difficult to conclude, that compelling showing has been made that he has significant evidence of criminal activities which is important for the Grand Jury to have.

On the other hand, by traditional standards, it seems to me that the Grand Jury might reasonably wish to inquire into the apparent use in part of his position as a public official on behalf of a prisoner whom they view, whom it has been related to them is a member of organized crime, to use a term which has been thrown around, and there is at least a possibility in the absence of any answers from the Father that he might have information of some criminality attending Napoli's treatment.

So by traditional standards, a basis for his testimony has been established.

The question is whether the First Amendment claim is sufficiently valid to impose the kind of burden that it has been suggested would be imposed on the Grand Jury if it were valid.

The problem is a complicated one.

Father Gigante is a priest, and that which he did, in fact, is suitable to the ministry. And he has presented just a few

moments ago I think a very thoughtful and illuminative picture of his concept of the ministry and as it applied to Mr. Napoli.

As against that, the evidence discloses a relationship which, on the face of it, appears to have been a close personal one.

There is no indication that Mr. Napoli was a parishioner, or that there was an ongoing traditional priest-parishioner relationship. And in the conversations which have been the subject of testimony, there are interspersed with the efforts on Mr. Napoli's behalf illusions to efforts on behalf of the Department of Correction and of high officials of the Department of Correction made by Father Gigante at least in part in his capacity as a public official.

Recognizing that what he did was suitable to a minister and that from his point of view he was acting as part of his ministry, the total picture presented, in my view, makes questionable the application of a privilege, the legal basis for which even at this point I think is quite unclear.

There's also been some questioning about efforts to alter assignments for Mr. Crane.

I must say that I'm baffled at the pursuit of that particular area of inquiry because the evidence indicates that a picture was presented to Father Gigante of what clearly would be an injustice to Mr. Crane in terms of his assignment, to which his response would, I thought, have been a clearly appropriate one. But I suppose consistent with the general right of the Grand Jury, they can ask him about that as well if they wish to.